114th Session **Judgment No. 3159**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. F. against the World Health Organization (WHO) on 14 July 2010, WHO's reply of 8 November, the complainant's rejoinder of 18 November 2010 and the Organization's surrejoinder of 18 February 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian national born in 1952, joined WHO's Regional Office for Europe (EURO) in June 1993 at grade P-4. As from December of that year he was employed under 29 successive short-term appointments, some of which were followed by a break in service usually lasting less than 30 days. He was promoted to grade P-5 on 9 January 1998. In January 2005 his short-term appointment was converted to a one-year fixed-term appointment with retroactive effect from 4 August 2004. This appointment was extended five times until 31 December 2008.

In December 2007 the complainant was informed by both his first-level supervisor and the Administration that EURO was planning to abolish his post. Following discussions with the Deputy Regional Director of EURO and his first-level supervisor, by a letter dated 22 September 2008 from the Director of the Division of Country Health Systems the complainant was notified that his post would in fact be abolished. His last day in service would be 31 December 2008, but he was encouraged to apply for any other positions he felt matched his qualifications.

The complainant filed a notice of intention to appeal with the Regional Board of Appeal (RBA) on 19 November 2008, challenging the decision to abolish his post. The RBA concluded that WHO had acted in accordance with the relevant Staff Regulations and Staff Rules but noted that, despite the complainant's years of service, the Organization had failed to assist him to find another suitable position. By a letter of 5 August 2009 the Regional Director of EURO dismissed the complainant's appeal, pointing out that he did not meet the criteria for inclusion in a reassignment process under Staff Rule 1050.2, which applies only to staff members who have served on a fixed-term appointment for a continuous and uninterrupted period of five years or more.

On 6 October 2009 the complainant filed a notice of intention to appeal with the Headquarters Board of Appeal (HBA) challenging the decision of 5 August. He alleged personal prejudice, incomplete consideration of the facts and failure by the Administration to observe or apply correctly the provisions of the Staff Regulations or Staff Rules. The HBA concluded that EURO had acted within its authority in deciding to abolish the complainant's post and that that decision had not been tainted with personal prejudice. However, it stated that the Administration could have included the complainant in a reassignment process at its discretion, and that for the purpose of determining his period of continuous service it should have considered his service from at least September 2002. It pointed to his long history of employment under short-term contracts performing the same duties and noted that those contracts had often been punctuated by breaks of less than 30 days, in contravention of the relevant rules. The HBA was of the opinion that the use of short breaks of only one or two weeks between periods of service was insufficient to set his contracts apart – in particular, to set apart his final short-term appointment from his fixed-term appointment – in terms of continuity of service. It held that the Organization used short breaks as an artificial means of preventing long-serving staff members from reaching the five years of continuous service required for inclusion in a reassignment process. The HBA recommended inter alia that the complainant be reinstated with full pay with effect from 1 January 2009, that immediate efforts be made to reassign him through a formal process conducted by a Reassignment Committee, and that he be awarded 20,000 Swiss francs in moral damages, expenses under Staff Rule 1230.7 and 2,500 francs in costs upon presentation of bills.

By a letter of 24 May 2010 the Director-General informed the complainant that she agreed with the HBA's conclusion that the abolition of his post was lawful and not biased by personal prejudice. However, as she did not agree with the Board's remaining conclusions she had decided to dismiss his appeal but would, upon receipt of proof of payment, award him the costs of his travel to present his case to the HBA. That is the impugned decision.

B. The complainant submits that upon the expiration of his contract he had served for 15 years as a professional officer. At the material time – between 2002 and 2004 – short-term appointments were limited to a period of 11 months pursuant to Staff Rule 420.3. Moreover, Cluster Note 2002/21, concerning revised contractual arrangements for temporary staff, stipulated that there had to be a break of 30 days between such appointments, unless the programme concerned provided written justification for a shorter break. He argues that he was employed continuously from 4 September 2002 until the conversion of his appointment to a fixed-term appointment, with only two 15-day breaks in service, and WHO failed to provide the required written justification for these short breaks.

Referring to Judgments 1385 and 2263, he also argues that the Tribunal has previously held that when short-term contracts are used during a long-term employment relationship, service under the short-term contracts is to be considered continuous even where there are breaks in service. In his view, this principle is especially applicable where the internal appeal body has determined the form of contract to be "artificial".

The complainant contends that, even if his service under short-term contracts has disqualified him from the application of Staff Rule 1050.2, WHO owes him a duty of loyalty based on his length of service. He refers to Judgment 2902 as authority for the proposition that even if an organisation has no obligation to find an alternative post for an official whose post is abolished, it has a duty to explore with that official possible options prior to his or her separation, and failure to do so is an affront to the official's dignity. In this connection he points to the RBA's finding – cited by the HBA – that the Administration failed to make any serious efforts to identify another suitable position for him.

Lastly, he asserts that, in breach of well-established legal principle, the Director-General failed to provide reasons for rejecting the HBA's recommendation that he be awarded legal costs.

The complainant asks the Tribunal to quash the impugned decision, to order his reinstatement with retroactive effect from 1 January 2009 with full salary and benefits, and to order the defendant to undertake immediate action to assign him to a suitable post. He claims 20,000 Swiss francs in moral damages and 7,500 francs in costs for both these and the internal proceedings.

C. In its reply WHO asserts that Staff Rule 1050.2 does not confer a right to reassignment upon any staff member, but merely a right for any eligible staff member to be considered for reassignment in the event that his or her post is abolished. In the complainant's case, he was not included in a reassignment process because he had not served on a fixed-term appointment for a continuous and uninterrupted period of five years or more. Although he served under short-term appointments for a number of years prior to obtaining a fixed-term appointment, this did not entitle him to participate in a reassignment process. There is no statutory basis for him to be treated retroactively as if he held a fixed-term appointment during the periods when he served under short-term appointments; he was recruited under a short-term appointment without having to undergo a competition process and he freely accepted the terms of his appointments. As the complainant has not demonstrated that his contracts were in breach of a fundamental and overriding principle of law, or that his apparent consent was vitiated, in WHO's view the Tribunal is not competent to reform those contracts or otherwise remake the bargain which the parties chose to make themselves.

The Organization points out that the Tribunal has previously rejected claims from other complainants who requested to be treated as fixed-term staff members even though they had been recruited as short-term staff. In addition, it disputes the complainant's assertion that he was intentionally deprived of the benefits of a fixed-term contract. It asserts that bad faith must be proved and that the complainant has failed to provide evidence that his continued service on short-term appointments was motivated by anything other than its operational and budgetary requirements.

Referring to Judgment 2902, WHO submits that it took appropriate steps to fulfil any duty that it owed the complainant to assist him following the abolition of his post. He was kept informed of new vacancies and was encouraged to apply for any vacant position for which he felt he had the required qualifications and experience. However, although he was free to apply for any post in which he was interested, he declined to pursue vacancies for which he was qualified. WHO argues that reinstatement is not an appropriate remedy in this case, the complainant having separated from service as a result of a lawful decision to abolish his post.

D. In his rejoinder the complainant presses his pleas. He rejects WHO's assertion that contracts freely entered into are binding and, referring more particularly to Judgment 2086, he notes that the

Tribunal has previously held that the name given to a contract does not necessarily reflect the actual employment relationship. He states that he has applied for numerous vacancies in addition to those mentioned by the defendant, without success.

E. In its surrejoinder WHO maintains its position. It contends that the version of Staff Rule 420.3 in force at the material time did not stipulate a maximum period of service on short-term appointments, nor did it make reference to breaks in service. Furthermore, the complainant's service following the entry into force of Cluster Note 2002/21 on 1 July 2002 was in compliance with the terms of that document. In addition, it asserts that the facts of the cases leading to Judgments 2086 and 2263 are distinguishable from those of the present case, and the complainant's circumstances do not warrant the same conclusions with respect to the legal nature of his employment relationship.

CONSIDERATIONS

1. The central issue in the present case is what were the obligations of WHO towards the complainant immediately preceding and following his separation from the Organization on 31 December 2008 when the post he then occupied was abolished. In some cases, when a post in WHO is abolished, the Organization must attempt to reassign the incumbent of the post. This situation is addressed by Staff Rule 1050.2 which provides:

> "When a post held by a staff member with a continuing appointment, or by a staff member who has served on a fixed-term appointment for a continuous and uninterrupted period of five years or more, is abolished or comes to an end, reasonable efforts shall be made to reassign the staff member occupying that post, in accordance with procedures established by the Director-General […]."

2. The complainant had been employed by WHO for 15 periods commencing on 28 June 1993 and concluding on 31 December 2008. Except for the last of those periods, he had been employed on

short-term appointments of less than a year. The breaks between these periods generally ranged between one and two weeks, with three longer breaks of between four and five weeks. The last period commenced on 4 August 2004 and lasted approximately four years and five months. That period had been preceded by a break of 15 days from the preceding period (from 20 August 2003 to 19 July 2004), during which the complainant had been employed on short-term appointments. Before that, and again only after a break of 15 days, there had been a period of employment on a short-term appointment commencing on 4 September 2002 and concluding on 4 August 2003.

3. In his brief, the complainant advances two contentions. The first is that he is entitled to the benefit conferred by Staff Rule 1050.2. The second is that, even if this is not correct, WHO had a duty of loyalty to him that was breached. He argues that the Tribunal's case law has it that when short-term contracts are used for a long-term employment relationship, service under the short-term contracts is to be considered continuous even where there are breaks in the service. Reference is made to Judgments 1385 and 2263.

4. WHO argues in its reply that the Tribunal has consistently declined requests for short-term staff members to be retroactively treated as fixed-term staff members solely on the basis of their long service and that the Tribunal will not disturb the terms of an agreement into which the parties freely entered unless it can be shown that they have violated some fundamental and overriding principle of law, or the consent was vitiated. In support of those arguments reference is made to Judgment 2107 (as to the former) and Judgment 2097 (as to the latter). WHO contends it fulfilled any duty it owed to the complainant and made appropriate efforts to assist him in finding a new post. The complainant's rejoinder and the Organization's surrejoinder substantially repeat arguments earlier advanced.

5. The complainant's initial appeal was against the abolition of his post. The internal appeal process culminated in a report of the

HBA which concluded that EURO was within its authority to decide to abolish the complainant's post. The HBA also found that there was no personal prejudice in the decision. However, it found the complainant's request for recognition of his 15 years of service to be a reasonable one and noted that he could have been placed in reassignment at management's discretion. It concluded that the complainant's service for the purposes of determining continuing service should have been considered since at least September 2002, in view of the previous history of contracts which were for the same function and the fact that the breaks between them were short, "contravening the directive on maintaining a 30 day break as was being followed at the time in WHO".

6. The HBA went on to say:

> "The Board was of the opinion that the use of short breaks of only one or two weeks, between the 11 month contracts, was insufficient to set contracts effectively apart, in this case the temporary contract from the fixed term contract, in terms of continuity of service to the Organization. The short break was intended as an artificial means by the Organization from keeping long serving staff, such as the Appellant, from ever reaching the five-year period, necessary for eligibility for reassignment."

7. On the basis of this reasoning, the HBA concluded that the complainant was entitled to all benefits of a fixed-term appointment as of at least September 2002, including the reassignment process, considering the continuing nature of his contracts. It also concluded that the complainant had suffered material damage and hardship arising from the premature end of his career. It recommended, amongst other things, his reinstatement from 1 January 2009 on full pay, immediate consideration by the Reassignment Committee to find a suitable position for the complainant and payment of moral damages in the amount of 20,000 Swiss francs.

8. In a letter to the complainant of 24 May 2010, the Director-General accepted the HBA's conclusions concerning the authority to abolish the complainant's position and lack of personal prejudice. She

otherwise rejected the HBA’s conclusions. This is the decision the complainant seeks to impugn before the Tribunal.

9. The terms of Staff Rule 1050.2 are clear. They impose a duty on the Organization in specified circumstances. The duty is to use reasonable efforts to reassign a staff member whose post is being abolished. The specified circumstances are, as to a staff member on a fixed-term appointment, that the staff member has served “for a continuous and uninterrupted period of five years or more”. The expression “continuous and uninterrupted” fairly emphatically focuses attention on service of a particular character. There is no basis in the language of the Staff Rule to treat its operation as ambulatory in the sense that a person who has been on a fixed-term appointment but has not served in that capacity for a continuous and uninterrupted period of at least five years is nonetheless a person to whom the Organization, by operation of the Rule, is under a duty to make reasonable efforts to reassign. The period of five years is arbitrary in the sense that the policy objective of the Rule (to recognise the special position of long-serving staff members whose posts are abolished and that it is appropriate for them to be assisted in finding another post) would equally be met by a slightly shorter or even longer period. However, five years is the period identified in the Rule and the complainant had not served continuously for that period.

10. Moreover, there is nothing in the history of the complainant’s earlier employment on short-term contracts to suggest that the arrangements were anything other than a manifestation of the intention of the parties, or that they did not constitute agreements freely entered into by them. The HBA’s conclusion, apparently to the opposite effect, that the short-term contracts were an artificial means or device is not founded on any evidence that might support that conclusion. This is to be contrasted with the unusual circumstances revealed in Judgment 1385 where a period of employment on a short-term contract was, on the evidence, adopted as a device by the defendant Organization to deny the complainant the protection of an otherwise applicable rule. In those circumstances, the Tribunal was

prepared to examine the real intention of the parties otherwise obscured by the short-term employment. In the present case, where there is no evidence of contrivance, the complainant's periods of short-term employment are irrelevant, as employment on short-term contracts is not a circumstance identified in Staff Rule 1050.2 as one enlivening its operation. Having regard to the facts of this case, that Rule has no application to the complainant.

11. An additional argument the complainant advances in his brief concerns Staff Rule 420.3 which was in force in September 2002 and Cluster Note 2002/21 which took effect on 1 July 2002. It is an argument that appears to have found favour with the HBA. Staff Rule 420.3 provides:

> "A 'temporary appointment' is an appointment for a period not exceeding 11 months. There are two categories of temporary appointment: 'short-term appointments' and 'term-limited appointments'. Such appointments are granted in accordance with conditions determined by the Director-General."

The relevant parts of Cluster Note 2002/21 provide:

> "8. Subject to paragraphs 21 and 22 below, the total period of service with WHO under combined temporary appointments shall be limited to a maximum of four 11-month periods of employment (i.e., 44 months out of 48 months). The duration of temporary appointments may vary, but the maximum duration of any single temporary appointment, whether short-term or term-limited, is 11 months.
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> 9. Entry in service on a temporary appointment is always on a short-term appointment with a maximum duration of 11 months. The total period of service under short-term appointments is limited to 22 months out of 24 months. This may be followed by a term-limited appointment.
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> […]
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> 11. There must be a period of non-WHO employment of no more than 30 calendar days between each period of employment under temporary appointments of 11 months' duration. This 30-day period may not be reduced unless, due to programme requirements, the programme provides a written justification. Under no circumstances can the period be reduced to less than 15 calendar days."

12. As noted earlier, the final period of the complainant's employment of over four years on a fixed-term contract had been preceded by a break of 15 days from the preceding period, during which he held short-term appointments. Before that, and again only after a break of 15 days, there had been another period of employment on a short-term appointment.

13. In his brief, the complainant points to these two breaks of 15 days and observes that WHO "has provided no evidence of written justification for overriding the applicable rules", a reference to the penultimate sentence in paragraph 11 of the Cluster Note. This issue is only addressed by WHO in its surrejoinder. The Organization does not contend there was "written justification" for the purposes of paragraph 11, but rather argues "[t]he Cluster Note does not require 30 day breaks but [is] a restriction on months of service within a particular period". The Organization does not refer to paragraph 11 in its argument in its surrejoinder, only to paragraphs 8 and 9.

14. The complainant relies on Judgments 2086 and 2263, both of which concerned the same staff member. In that matter, the staff member's request for promotion was conditional on him having had 18 years of continuous service under a fixed-term contract. The question of whether he had the requisite service was obscured by his early employment with the organisation. He had been employed continuously for almost two years on short-term contracts, had a break for a month, and was then employed on another short-term contract for almost three months. Immediately after that he was employed on a fixed-term appointment, which was extended until he was given a permanent appointment in another post. Two questions arose. Could all or any of his initial two years on short-term contracts count towards the required 18 years' employment under a fixed-term contract and, if so, did the one-month break affect the continuity of the service?

15. As to the first question, the Tribunal referred to an existing rule prohibiting employment on short-term contracts for periods of

more than 12 months. It concluded that the first 12 months of the two-year period could not be counted towards the required 18 years, but that the remaining period could, because it exceeded the maximum period of employment under short-term contracts. As to the second question, the Tribunal concluded that the break had been justified "only by the fact that he was employed under short-term contracts". Because the break occurred at a time when the staff member was deemed to be in continuous service, even though he was employed on a short-term contract, the Tribunal concluded that the break should be viewed as a period of leave.

16. In the present case, the complainant's last two periods of service on short-term appointments (from September 2002 to August 2003 and from August 2003 to July 2004) are not directly tainted by illegality. Cluster Note 2002/21 permitted the use of short-term appointments for periods of that length, unlike the initial period of service in the two judgments mentioned above. What must be determined, is the legal effect of the length of the break between these two periods (and, perhaps, the length of the break following the second) being apparently less than the length authorised by the Cluster Note.

17. In certain circumstances, it is lawful for WHO to provide for a break of 15 days following a period of employment on a temporary contract before re-employing a person on a further temporary contract. The precondition for doing so is that the "programme provides a written justification". WHO has not responded in its reply or surrejoinder to the complainant's observation in his brief that it has provided "no evidence of written justification". But even if the length of the first break under discussion (in August 2003) was not authorised, it does not follow that the legal effect of this violation of Cluster Note 2002/21 is that the character of the following period of employment (from August 2003 to July 2004) changed from a short-term appointment to a fixed-term appointment. The parties freely entered an agreement in August 2003 which was on the basis that the

appointment was a short-term one. There is no rational or legal basis for concluding that the parties' intentions were otherwise simply because the break preceding that appointment was shorter than the break authorised by the Cluster Note.

18. In the result, the complainant had not served for a continuous and uninterrupted period of five years or more on a fixed-term appointment for the purposes of Staff Rule 1050.2. That Rule does not apply to the complainant's circumstances.

19. However, a staff rule cast in terms of Staff Rule 1050.2 does not preclude the possibility that the Organization is under a duty requiring proactive conduct in circumstances not comprehended by the Rule itself. WHO does not put in issue that there is a general duty of loyalty, as the complainant contends. What might be required of an organisation in broadly similar circumstances was considered by the Tribunal in Judgment 2902. In that matter the complainant had been appointed in 1992 to a position under a project personnel appointment, limited by its terms to service on a particular project. However, the project was extended in 1994, 1996, 1999 and 2003. Accordingly, he remained in employment until his separation in 2005 though, in fact, an evaluation in 2005 proposed an extension of the project, albeit restructured in a way that meant the complainant's position was abolished. The Tribunal rejected the suggestion that the Organization had been under a duty to offer the complainant alternative employment under the applicable Staff Rules. But the Tribunal said:

> "However, it had a duty to explore with him possible options prior to his separation. The failure to do so was an affront to his dignity and showed a lack of respect for him as a highly regarded long-serving staff member."

20. The same reasoning can be applied in the present case. The complainant and WHO found it mutually acceptable, and with benefits accruing to both, for the complainant to be employed on a series of short-term appointments for much of the complainant's employment. But the complainant nonetheless had worked, in a real and practical sense, for over a decade and a half in the service of the Organization.

In those circumstances, WHO was obliged to explore with the complainant other employment options prior to his separation.

21. Neither party has submitted extensive documentation or other evidence on the question of steps taken to satisfy this requirement entailing the exploration of options by WHO. In his brief, the complainant, after quoting the above passage from Judgment 2902, simply invites the Tribunal to consider a conclusion reached by the RBA and quoted by the HBA, namely that "management has not made any serious efforts to find […] another suitable position". In its reply the defendant generally contends "[t]he complainant was informed of, and encouraged to, apply to any new vacant positions for which he felt that he had the required qualifications and experience". Annexed to the complainant's brief was a letter to him of 22 September 2008 notifying him of his separation and saying:

> "[Y]ou are encouraged to apply for fixed-term or other temporary positions which you feel you are qualified for, that are announced on WHO's e-recruitment website.
>
> If you need any clarifications on this subject, please do not hesitate to approach me or the Human Resources Manager."

22. In addition, WHO specifically observes that the complainant chose not to apply for a post "for which he received a special notification from the Human Resources Manager". Neither the general contention nor the specific observation of the defendant are challenged by the complainant in his rejoinder. Rather, the complainant explains why he did not apply for the last mentioned post and says, of his failure to apply, "[i]f this was a mistake, it was an entirely innocent one". The complainant then set out various positions for which he had applied and not been shortlisted, or for which he had been shortlisted but not selected.

23. The Tribunal cannot conclude that WHO failed in its duty to the complainant. It is not sufficient, as the complainant frames his case, to demonstrate that he was unsuccessful in applying for a range

of positions. Had WHO been under a duty to take reasonable steps to reassign the complainant, the failure of the complainant to secure another post and the reason for the failure could have been an element of the complainant's case. But as earlier discussed, WHO was not under any such duty.

24. One final matter must be addressed. In its recommendations, the HBA recommended the payment of the complainant's legal costs of the internal appeal in the sum of 2,500 Swiss francs upon presentation of bills. The complainant contends in his brief that the Director-General failed to give reasons for rejecting this recommendation in her decision of 24 May 2010. It can be accepted that the Director-General dealt with this question in a summary way. However, the rejection of this particular recommendation concerning costs rationally followed the rejection of all recommendations of the HBA favourable to the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Dolores M. Hansen
Michael F. Moore
Catherine Comtet